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No. 90-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CITIZENS ACTION COALITION OF INDIANA, INC.
CITY OF TERRE HAUTE, INDIANA
SAVE THE VALLEY, INC.,

Petitioners,

v.

PUBLIC SERVICE COMPANY OF INDIANA, INC.
OFFICE OF UTILITY CONSUMER COUNSELOR, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

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QUESTION PRESENTED

Whether parties seeking to present an appeal in an important and controversial case to a state supreme court are deprived of the "appearance of justice" required by the Due Process Clause of the Fourteenth Amendment when a justice who casts a deciding vote to deny their appeal discloses *ex parte* to a representative of an opposing party the outcome of the court's preliminary vote in conference regarding the appeal, fails to recuse himself prospectively from the final decision of the appeal even though he knows the news media has learned of the *ex parte* disclosure, and then refuses to recuse himself retroactively when the *ex parte* disclosure becomes public.

LIST OF PARTIES

Citizens Action Coalition of Indiana, Inc.

City of Terre Haute, Indiana

Save The Valley, Inc.

Public Service Company of Indiana, Inc.
(now PSI Energy, Inc., a subsidiary of PSI Resources, Inc.)

Office of Utility Consumer Counselor

United Mine Workers of America - District 11

Industrial Energy Consumers Group
(consisting of Arco Aluminum, Cabot Corporation, Chrysler Corporation, General Motors Corporation, Firestone Tire and Rubber Company, and Inland Container Corporation)

Indiana Association of Cities and Towns

Public Service Indiana Investors, Inc.

Wabash Valley Power Association

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v.

PUBLIC SERVICE COMPANY OF INDIANA, INC.
OFFICE OF UTILITY CONSUMER COUNSELOR, *et al.*,[1]

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

Petitioners Citizens Action Coalition of Indiana, Inc., City of Terre Haute, and Save The Valley, Inc. ("Coalition") respectfully request that a writ of certiorari issue to review the decrees of the Indiana Supreme Court in this case because they did not result in the "appearance of justice" required by the Due Process Clause of the Fourteenth Amendment.

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[1] The other parties to proceedings before the Indiana Supreme Court were: United Mine Workers of America—District 11; Public Service Indiana Investors, Inc.; Industrial Energy Consumers Group; Wabash Valley Power Association; and Indiana Association of Cities and Towns. However, the parties identified in the caption were the only ones to file briefs, present argument or otherwise participate actively in the proceedings below.

OPINIONS BELOW

The decree of the Indiana Supreme Court denying transfer (i.e. discretionary review) of the Coalition's appeal is unpublished and is reprinted in the appendix to this petition at Pet. App. 3a. The decree of the Indiana Supreme Court denying the Coalition's Verified Joint Petition for the Recusal Nunc Pro Tunc of Justice Richard M. Givan, for Vacation of Order Denying Transfer, and for Consideration Anew of Petition to Transfer is unpublished and is reprinted in the appendix to this petition at Pet. App. 1a. The opinion of the Indiana Court of Appeals in the appeal for which transfer was sought is reported at 552 N.E.2d 834 and is reprinted in the appendix to this petition at Pet. App. 5a-23a.

JURISDICTION

The decree of the Indiana Supreme Court denying transfer was entered on March 13, 1991. The Coalition's Verified Petition for the Recusal Nunc Pro Tunc of Justice Richard M. Givan, for Vacation of Order Denying Transfer, and for Consideration Anew of Petition to Transfer was denied on April 11, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in this case is the Due Process Clause of the Fourteenth Amendment, which provides "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This petition arises from the extraordinary conduct of Justice Richard M. Givan of the Indiana Supreme Court who, while this case was pending transfer to that court, disclosed *ex parte* to a representative of Respondent Public Service Company of Indiana, Inc., the outcome of the court's preliminary vote in conference regarding transfer, failed to recuse himself prospectively from the final decision of the case even though he knew the news media had learned of the *ex parte* disclosure, and then refused to recuse himself retroactively when his role in the *ex parte* disclosure became public.

1. Factual Background[2]

On Wednesday, March 6, 1991, the Indiana Supreme Court heard oral argument on the Coalition's Petition to Transfer its appeal from the March 7, 1986 order of the Public Service Commission of Indiana authorizing approximately $500 million of rate relief for the Respondent Public Service Company of Indiana ("PSI"). PSI is Indiana's largest electric utility, serving approximately 500,000 customers in 69 of the state's 92 counties. The Coalition's appeal involved important and controversial issues regarding the reg-

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[2] The Indiana Supreme Court denied the Coalition's request for a hearing on its Verified Petition. Consequently, the facts presented here regarding Justice Givan's conduct and the Indiana Supreme Court's deliberations are drawn from the Coalition's Verified Petition, which necessarily was based primarily on news reports. However, in opposing the Coalition's request for a hearing in its Response to the Verified Petition, Respondent PSI stated, "There are no identified, disputed issues of fact before the Court." The news reports relied upon by the Coalition are included in the appendix to this petition.

ulation of PSI's customer rates following the cancellation and write-off of the Marble Hill Nuclear Project, which had been the subject of great public controversy since its inception in the mid-1970s. At issue principally was whether the Commission could lawfully exercise its emergency powers to require PSI's ratepayers to replenish capital lost when Marble Hill was written off, even though the project had never become "used and useful" and no determination of its prudence had ever been made. The Indiana Court of Appeals had decided the appeal 2-1, with a vigorous dissenting opinion on the principal issues.

At the oral argument before the Indiana Supreme Court, Chief Justice Randall T. Shepard announced that Justice Jon D. Krahulik had recused himself from consideration of the case, so only four justices would participate in deciding the case. In keeping with the Indiana Court's usual practice, the reason for Justice Krahulik's recusal was not announced. Immediately following the oral argument, the four participating justices discussed the case in conference and held a preliminary vote whether to grant transfer. The preliminary vote was a tie, Justices DeBruler and Dickson voting to grant transfer, Chief Justice Shepard and Justice Givan voting to deny transfer.

On Monday, March 11, 1991, Justice Givan met Paul G. Jasper for lunch. Mr. Jasper was for more than twenty years an officer of Respondent PSI and is now an officer of the Indiana Electric Association ("IEA"), which includes PSI among its five members. He is also a long-time friend and associate of Justice Givan's, with their relationship dating back to 1949 when Mr. Jasper was himself an Associate Justice on the Indiana Supreme Court and Justice Givan was a

research assistant in the Court's library. During their lunch, Justice Givan told Mr. Jasper that the four justices participating in this case had tied 2-2 on the Coalition's Petition to Transfer, so that transfer would be denied.

Mr. Jasper has said he communicated the information disclosed by Justice Givan to "someone" after their luncheon, but has not divulged who it was. However, at least three individuals had received the information by mid-morning on Tuesday, March 12: Fred E. Schlegel, an attorney of record for PSI in the current case; Richard P. Stein, until recently an officer of PSI and now a contract lobbyist for PSI; and Larry Mohr, former President of the IEA. Follow-up inquiries by the media after a tip to a reporter for the *Indianapolis Star* on the morning of Tuesday, March 12 resulted in knowledge becoming widespread by that afternoon that there had apparently been an unauthorized disclosure regarding the Court's deliberations. Media inquiries also had alerted the Court to the likelihood of an unauthorized disclosure by the afternoon of March 12. However, the identities of the original source and recipient of the disclosure were not generally known at that time.

The justices of the Indiana Supreme Court met in conference on the afternoon of Tuesday, March 12, to discuss the case again. They also discussed the unauthorized disclosure of their preliminary vote to deny transfer. According to Justice Givan, he confessed on the spot to being the source of the disclosure to assure no one else was blamed for it. He explained to his fellow justices that he had made the disclosure during lunch on Monday in the mistaken belief that the Court's decision had already been

handed down and made public the previous Friday. According to Justice Givan, his fellow justices did not admonish him for the disclosure: "I just told them what happened and they said, 'Oh, well, things like that happen sometimes.' We all understand the situation. They don't have to tell me." Following the conference, the Court neither handed down its decision nor responded to media inquiries regarding the unauthorized disclosure of the outcome of its prior deliberations.

Although there were no public developments in the case on March 12, there was unusual trading activity in PSI stock. On that day, 1,330,000 shares were traded—roughly ten times the average daily volume for the prior thirty days. Block trades were larger and more numerous on March 12 than typical for PSI's stock. Having sold only 130,000 to 140,000 shares per week since beginning a program on December 1, 1990 to systematically liquidate a five million share holding in PSI, Fund America Companies sold 2.5 million shares in the week following the March 6 oral argument—including a one million share block trade on March 12. The March 12 trading activity represented 74% of the PSI shares traded for the week of March 11 and approximately 2.5% of PSI's total outstanding shares. The March 12 volume also made PSI the eleventh most active stock on the New York Stock Exchange.

This unusual trading activity took place after Messrs. Mohr and Stein learned from a reporter between 10:00 and 11:00 a.m. on March 12 that no decision in the case had yet been disseminated to the media. Notably, at 11:26 a.m., the one million share block of PSI stock sold at $17^1/_4$, the low for the day.

In the next ten minutes, four smaller block trades took place at the same price on the Midwest and Pacific exchanges, where PSI stock trades only infrequently. Later, at 2:46 p.m., there was an over-the-counter trade of an extraordinarily large block of 127,000 shares.

It was not until late in the afternoon of the next day, Wednesday, March 13, that the Indiana Supreme Court did hand down its decision in the case. The Court issued its Order Denying Appellants' Joint Petition to Transfer, which ruled:

> After thorough deliberation, the four participating members of the Court are evenly divided upon the question of accepting or denying transfer. Pursuant to Ind. Appellate Rule 11(B)(5), "transfer shall be deemed denied and the decision of the Court of Appeals shall be affirmed and becomes the law of the case."
>
> ACCORDINGLY, the Court now DENIES the "Appellants' Joint Petition to Transfer."

On Saturday, March 16, the *Indianapolis Star* reported in a front-page story that the Court's decision had been "accidentally leaked" before it was handed down and made public. Citing the Court's administrator as its source, the *Star* reported there had been "some confusion" regarding the justices' votes which had caused a delay in the release of the Court's order, during which "some information may have been released inadvertently." However, the Court did not release the identity of either the source or the recipient of the leak to the *Star* reporter. The *Star* story is reproduced in the appendix to this Petition at Pet. App. 24a-26a.

On Wednesday, March 20, the *Louisville Courier-Journal* reported in a front-page story that Justice Givan had been the source and Mr. Jasper had been the recipient of the unauthorized disclosure of the Court's March 6 conference vote on transfer. The story quoted Justice Givan as saying, "I just in passing happened to mention . . . that the order had gone down, that we were tied and that the Court of Appeals opinion . . . was left standing." According to the *Courier-Journal*, Givan had mistakenly thought on March 11 that the Court's order had been prepared the day following the Court's March 6 conference and had been sent to the Clerk's office and released to the public on Friday, March 8. However, "some justices" were "reconsidering" their conference votes, so the Court's order was not handed down until March 13. The *Courier-Journal* story is reproduced in the appendix at Pet. App. 27a-32a.

On Thursday, March 21, the *Indianapolis Star* confirmed in a front-page story that Justice Givan had been the source and Mr. Jasper had been the recipient of the unauthorized disclosure of the tie vote in the March 6 conference. While essentially corroborating the *Courier-Journal* account, the *Star* story provided certain clarifying details, including Justice Givan's view that the disclosure "would have caused a lot more concern if we had been effecting a big change [in the outcome of the case, but] our decision just let it all stand." The March 21 *Star* story is reproduced in the appendix at Pet. App. 33a-35a.

2. Presentation Below of Federal Question

The Coalition presented to the Indiana Supreme Court the federal question for which it is now seeking review by this Court in Appellants' Verified Joint

Petition for the Recusal *Nunc Pro Tunc* of Justice Richard M. Givan, for Vacation of Order Denying Transfer, and for Consideration Anew of Petition to Transfer, filed April 2, 1991. While the Coalition also made the argument that Justice Givan's disqualification was required by the Code of Judicial Conduct, Paragraph 9 of the Verified Petition expressly asserted and cited authority for the legal proposition that the Due Process Clause of the Fourteenth Amendment of the United States Constitution mandates the "appearance of justice" in state judicial proceedings, including appeals in courts of last resort, and therefore can require "judicial disqualification on the basis of the appearance of partiality." Paragraph 15 claimed that Justice Givan's conduct in this case constituted an appearance of partiality sufficient under the "reasonable judge" standard enunciated by the Fifth Circuit to deprive the Coalition of the "appearance of justice" required by the Due Process Clause. The filing of the Verified Petition was the first and only opportunity for the Coalition to present the federal question to the Indiana courts because Justice Givan's conduct did not occur until the Indiana Supreme Court's consideration of the Coalition's Joint Petition to Transfer. The federal question which the Coalition seeks to present to this Court was therefore squarely and properly before the Indiana Supreme Court. Consequently, the Indiana Supreme Court unequivocally, albeit summarily, ruled on the federal question presented below when, on April 11, 1991, it issued an order which denied "in all respects" the Coalition's Verified Joint Petition for the Recusal Nunc Pro Tunc of Justice Richard M. Givan, for Vacation of Order Denying Transfer, and for Consideration Anew of Petition to Transfer.

REASONS FOR GRANTING THE WRIT

This petition results from an extraordinary instance of the appearance of impropriety on the part of a single state judge that brings into clear focus the fundamental standards of conduct which must apply to all judges if the courts are not only to do justice, but appear to do justice.

1. The Due Process Clause Of The Fourteenth Amendment Requires That State Courts Not Only Do Justice, But Appear To Do Justice.

The United States Supreme Court has found that the United States Constitution's due process guarantee requires that impartial and detached judges preside over judicial proceedings, including appeals in state courts. As a result, the Due Process Clause of the Fourteenth Amendment requires disqualification of state and local judges under certain circumstances. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). *See also Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972). *See generally* Annot., *Due Process Clause of Fourteenth Amendment as Requiring Disqualification of State or Local Judge from Participation in Particular Litigation—Supreme Court Cases*, 89 L.Ed. 2d 1066 (1986). These circumstances include situations involving "judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, " 'justice must satisfy the appearance of justice.' " *Lavoie*, 475 U.S. at 825 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). *See also Offut v. United States*, 348 U.S. 11, 14 (1954). In other words, "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid

even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S.145, 150 (1968). Thus, in *Lavoie*, "the Court reiterated the position that due process requires disqualification on the basis of the appearance of partiality." Comment, *Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges under 28 U.S.C. § 455(a)*, 60 Temple L. Q. 697, 711 (1987). In effect, due process requires a judge to recuse himself whenever circumstances arise which would cause a hypothetical reasonable judge to question his impartiality. *United States v. Couch*, 896 F.2d 78, 82 (5th Cir. 1990).

The reason that the Due Process Clause requires disqualification on the basis of the appearance as well as the actuality of partiality is well-established:

> While an obvious goal of judicial disqualification law is to ensure that fair and impartial judges hear every case, this body of law serves an even more fundamental purpose: that of maintaining public confidence in the integrity of the judicial system. Public confidence is essential to effective functioning of the judiciary because, 'possessed of neither the purse nor the sword,' the judiciary depends primarily on the willingness of members of society to follow its mandates. The judiciary could not function as a viable institution in a democracy if the public lost faith in the impartiality and integrity of its judges.

Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 Case W. Res. 662, 663-664 (1985).

2. While Most Cases Of Judicial Disqualification Do Not Rise To A Constitutional Level, This Case Is The Exception Which Proves The Rule Because The Participation Of The Disqualified Judge Meant A State Supreme Court, In A Manner Highly Destructive of Public Confidence In The Judicial System, Did Not Appear To Do Justice.

Most matters relating to judicial disqualification do not rise to a constitutional level. *Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 702 (1948). Only in the "most extreme of cases" would the appearance of partiality based on circumstances other than a judge's direct, personal, substantial and pecuniary interest in the outcome be sufficient under the Due Process Clause to force recusal. *Lavoie*, 475 U.S. at 821. This case, however, is the exception that proves the rule. Justice Givan's conduct clearly required disqualification under well-established state standards and governing precedent applying those standards. But, there were five additional aggravating factors relating to Justice Givan or his conduct which make his refusal to recuse so destructive of public confidence in the judicial system as to implicate due process under the "reasonable judge" standard.

a. *The judicial conduct in question clearly required disqualification under well-established state standards and governing precedent applying those standards.*

Canon 3(A)(6) of the Indiana Code of Judicial Conduct prohibits a judge from making public comment about a pending proceeding in any Court. Canon 3(A)(4) prohibits him from initiating "ex parte or other communications concerning a pending . . . proceeding." The Indiana Supreme Court has unanimously held that a judge's private conversations with individuals concerning the outcome of pending cases con-

stitutes judicial misconduct. *Matter of Lewis*, 535 N.E.2d 127 (Ind. 1989). *Accord Matter of Bean*, 529 N.E.2d 836 (Ind. 1988); *Stivers v. Knox County Dept. of Pub. Welfare*, 482 N.E.2d 748 (Ind. Ct. App. 1985).

Here, of course, Justice Givan did not communicate the results of the justices' March 6 vote to all the parties in open court, or to each party in successive conferences in chambers. Instead, he disclosed this information over lunch to a representative of but one of the parties—Paul G. Jasper. When he did so, Justice Givan knew that Mr. Jasper had been for many years an officer of PSI and has been for many more years an officer of the IEA, an association of five utilities including PSI. As such, Mr. Jasper had an obvious and direct interest in the outcome of the litigation here, which involves a potential refund liability for PSI of as much as $500 million as well as a potentially precedent-setting decision affecting all IEA members. Furthermore, his fiduciary obligations to the IEA and its member utilities would provide a reasonable basis for anticipating that the information communicated to him would in turn be communicated to other officials of the IEA, as well as to officials of PSI. Mr. Jasper's long-term relationships with PSI and many of its present and former officials would also establish a reasonable expectation that information disclosed to him would be disclosed to PSI officials. A reasonable person, therefore, would have little doubt that when Justice Givan communicated with Mr. Jasper he knew he was also communicating with PSI. This is, of course, precisely what happened, with at least an attorney and a lobbyist employed by PSI early links in the chain of communication of the information disclosed to Mr. Jasper.

Justice Givan himself has conceded that his disclosure to Mr. Jasper would have been a violation of the Indiana Code of Judicial Conduct had he been aware the decision had not previously been handed down. According to the *Courier-Journal*, Justice Givan said: "Had I known that it wasn't down (in the clerk's office) and told him, I'd have violated the code. But I was just mistaken."

A judge's subjective state of mind may be relevant to whether state disciplinary proceedings are appropriate for a violation of the Code of Judicial Conduct. *Compare Matter of Bean*, 529 N.E.2d at 837 ("We find Respondent's *ex parte* communication in violation of Canon 3 of the Code of Judicial Conduct constituted willful misconduct in office.") *with Stivers v. Knox County Dept. of Pub. Welfare*, 482 N.E.2d at 751 ("We do not ascribe a purposeful intention on the trial judge's part to violate the canons [by his *ex parte* communications]."). However, a judge's recusal under Indiana law depends on whether "his impartiality might reasonably be questioned." Ind. Code of Judicial Conduct, Canon 3(C)(1).

In applying this same standard, the United States Supreme Court has ruled that whether a judge's conduct has given rise to an appearance of partiality requiring recusal from a case "does not depend on whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988). This ruling has consistently been followed by other courts, both state and federal, in later disqualification cases. *See, e.g. United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989); *Easley v. Uni-*

versity of Mich. Bd. of Regents, 853 F.2d 1351, 1358 (6th Cir. 1988); *Johnson v. Sturdivant*, 295 Ark. 622, 758 S.W.2d 415, 416 (1988).

Here, the public would find it difficult to believe that a member of the Supreme Court with Justice Givan's experience mistakenly thought, at mid-day Monday, March 11, 1991, that the order denying transfer had been in the Clerk's office on the preceding Friday. In the first place, Justice Givan well knew that the Indiana Court has a standard operating procedure by which each justice is notified in writing when a decision is handed down in a case. He would therefore know that the decision had not been handed down in the current case on March 8 because he had not received any notice of hand-down. In the second place, this case was obviously of great public interest, *e.g.* extra chairs were brought into the Supreme Court to accommodate the large number of the public and press who attended oral argument, and the argument was widely reported by newspapers, television and radio. Had the Court's decision been delivered to the Clerk's office by Friday, March 8, it would have been reported by the media and disseminated to the parties before mid-day Monday, March 11. So, if the case had already been handed down, Justice Givan would have read about it in the newspaper or heard about it on the radio. The very fact that Mr. Jasper, as an officer of the IEA, did not know the result by Monday, March 11 would also have been a reminder to Justice Givan that no order had been entered the previous week.

The perception of the hypothetical, reasonable person under these circumstances was reflected in the March 24, 1991 editorial of the Terre Haute *Tribune-Star*:

> What's that saying about ignorance being no excuse? That saying applies here: Givan's ignorance of the delay [in the issuance of the March 13 order] is no excuse. He still spoke out of turn. . . .

As a result, an objective, reasonable judge in Justice Givan's situation would have concluded that, whether he had intended to or not, he had clearly engaged in a prohibited *ex parte* communication giving rise to the appearance of partiality to a reasonable member of the public and he should therefore have disqualified himself.

b. *The judicial conduct in question was both truly extraordinary and readily avoidable.*

> [T]he more common a potentially biasing circumstance and the less easily avoided it seems, the less that circumstance will appear to a knowledgeable observer as a sign of partiality. If only a handful of judges paid federal income tax, for example, one might wonder about the appearance of one such judge deciding a tax case that could produce lower rates; when nearly all judges pay taxes, the appearance does not seem significant.

In re Allied Signal, 891 F.2d 967, 971 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 2561 (1990). Conversely, the less common and more easily avoided a circumstance seems, the more that circumstance will appear to a knowledgeable observer to be a sign of partiality. Here, the circumstance giving rise to the appearance of partiality was both truly extraordinary *and* readily avoidable.

Petitioners' diligent search of the case law nationally has yet to reveal *even a single prior instance* which has been reported of a justice disclosing *ex parte* the preliminary conference vote of a state supreme court prior to entry of an order or issuance of an opinion. Indeed, Petitioners have not found reported one prior instance of such a disclosure involving *any* appellate court at either the state or the federal level. So, the judicial conduct here is truly extraordinary.

What is more, it was easily avoidable. As Justice Givan himself told the *Courier-Journal*: "[C]ertainly in retrospect, I would have been well-advised before I said anything to anybody to make sure that [the order] was in fact in the clerk's office." In other words, all Justice Givan would have had to do to avoid the circumstance giving rise to the appearance of partiality was *to check* with the Clerk's office or the Court administrator.

c. *The appearance of partiality resulting from the judicial conduct in question is clear and striking.*

It is black letter law that "[a] judge should not initiate, invite, or consider an *ex parte* communication concerning a pending or impending proceeding before the judge." *E.g.*, *State v. Barker*, 420 N.W.2d 695, 699 (Neb. 1988). "Such a rule is a requisite to the orderly administration of justice in any judicial system." *State v. Valencia*, 124 Ariz. 139, 140, 602 P.2d 807, 808 (1979). The reason for strict prohibition of *ex parte* communications by judges on cases pending before them is simple and self-evident: private conversation regarding a pending case with persons interested in the outcome, "even through free of any actual or intended impropriety, is the type of circum-

stance especially likely to create the appearance of partiality." *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989). That an *ex parte* communication is with a friend of the judge who has an interest in the outcome is a further circumstance enhancing the appearance of partiality. *Deren v. Williams*, 521 So. 2d 150, 152 (Fla. Ct. App. 1988), *review denied*, 531 So. 2d 169. Indeed, the Indiana Supreme Court (with Justice Givan sitting) has had specific occasion to rule that the *ex parte* disclosure by a judge of the expected outcomes of pending cases constitutes serious judicial misconduct that seriously undermines public confidence in the integrity of the judicial process. *Matter of Lewis*, 535 N.E.2d 127, 129 (Ind. 1989).

Here, of course, Justice Givan's unauthorized *ex parte* disclosure concerned the secret, preliminary vote in conference of the justices of the Indiana Supreme Court on a case pending before them and was made to a long-time friend whom he knew to be both an active officer of an association which included a party to the case and a retired officer of the same party. It would be hard to conceive of an *ex parte* communication more likely to give rise to the appearance of partiality on the part of Justice Givan.

Justice Givan also knew by the time of the justices' second conference on the afternoon of March 12 that his *ex parte* disclosure to Mr. Jasper had compromised the confidentiality of the Court's deliberative process and the news media knew it. As Justice Frankfurter explained long ago, when a judge decides whether to recuse or participate in a case, "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *Public Utils. Comm'n v. Pollak*, 343 U.S.

451, 467 (1952) (Frankfurter, J., concurring). Following this "guiding consideration" under the circumstances here, the hypothetical, reasonable supreme court justice who knew he had made an indiscreet disclosure to the representative of a party of a vote in a prior conference on a pending case and that his indiscretion was likely to become public knowledge would immediately recuse himself and not participate in further deliberations or the final decision in order to protect public confidence in the administration of justice. Thus, Justice Givan's failure to recuse himself from the still pending case during the justices' March 12 conference would necessarily cause a reasonable judge to question whether his continued participation in the case was result-oriented.

This question becomes even larger in light of Justice Givan's comment reported in the March 21 *Indianapolis Star*, "It [i.e. his disclosure] would have caused a lot more concern if we had been effecting a big change. Our decision just let it [i.e. the Commission's 1986 order on appeal] all stand." Clearly, this remark reflects Justice Givan's belief that his disclosure would have been of more concern had it revealed to a Coalition representative a decision granting transfer, rather than telling a PSI representative that transfer had been denied. But, the reasonable jurist would not share Justice Givan's belief in a double standard for *ex parte* disclosures since, as the *Terre Haute Tribune-Star* commented on March 24, "[t]hat tie vote was a pretty big deal in Terre Haute because it kept the Supreme Court from hearing the case, effectively making PSI the winner."

d. *The judge in question cast the vote which decided that a state court of last resort would not issue an opinion on the merits of an important and controversial appeal.*

The Coalition's appeal involved important legal issues with significant financial consequences regarding the regulation of Indiana's largest electric utility following the cancellation and write-off of the controversial Marble Hill Nuclear Project. By not recusing himself, Justice Givan was able to cast the vote which determined that the Indiana Supreme Court would not decide this important and controversial appeal on the merits.

If Justice Givan had disqualified himself, the three remaining justices would have constituted a quorum of the Court, a majority of whom could have granted transfer and issued an opinion on the merits of the Coalition's appeal. Ind. Const. art. 7, § 2; Ind. Code § 33-2.1-2-1; *Davidson v. State*, 248 Ind. 26, 221 N.E.2d 814, 814 (1966), *cert. denied*, 387 U.S. 911. Of course, two of the other justices participating in the March 13 decision voted to grant transfer and issue an opinion on the merits, so presumably Justice Givan's disqualification would have resulted in transfer and an opinion on the merits. Consequently, Justice Givan's refusal to recuse himself deprived the Coalition of a decision by the Indiana Supreme Court on the merits of its appeal which could readily have reversed the order of the Public Service Commission.

In terms of the difference it made in the outcome of an important and controversial appeal, the disqualification at issue here is quite comparable to that involved in *Lavoie*, where the disqualified justice's vote resulted in a 5-to-4 decision affirming a lower

court order rather than a 4-4 decision occasioning the appointment of a special justice to decide the case. *Compare Lavoie*, 475 U.S. at 828 n.5, and accompanying text.

e. *The judicial conduct in question involved a judge with extensive judicial experience and familiarity with the relevant standards of judicial conduct.*

Justice Givan has been a member of the Indiana Supreme Court since 1969 and was Chief Justice from 1974 through 1987. Under article 7, § 4 of the Indiana Constitution, the Indiana Supreme Court has jurisdiction over the discipline of judges for the violation of the Indiana Code of Judicial Conduct. As Chief Justice, Justice Givan had chaired the state's Commission on Judicial Qualifications, which under article 7, § 9 of the Indiana Constitution investigates, hears, and, where appropriate, recommends disposition to the Indiana Supreme Court of complaints of judicial misconduct.

Given his judicial experience, Justice Givan obviously knew that the Code of Judicial Conduct prohibits public discussion of any pending case; that conferences of the Justices on pending cases, including their discussions and votes after oral arguments, are not to be disclosed at all, much less *ex parte* to a person whose position makes obvious his interest in the outcome; that the Indiana Supreme Court speaks only through its orders, opinions and notices; and that the very nature of appellate decision-making is such that each participating judge may reconsider his vote and whether to write a separate opinion until the written order or opinion of the Court is entered.

A justice who long held the highest position in the Indiana judiciary would also be conscious of Canon

2(B) of the Indiana Code of Judicial Conduct, which admonishes a judge not to allow social or other relationships to influence his judgment. Consequently, no reasonable judge would excuse Justice Givan's communication to Mr. Jasper because they are long-time friends. Instead, the reasonable judge would believe that the most basic purpose of the prohibition on extra-judicial discussions of pending cases was frustrated here precisely because the *ex parte* communication which occurred involved long-time friends. *See, e.g. Deren v. Williams*, 521 So.2d at 152 (long-standing friendship between judge and party's attorney coupled with *ex parte* communications between them gives rise to a genuine and reasonable belief by opposing party that he will not have his case tested impartially).

Indeed, the objective, reasonable judge would have a particularly difficult time excusing the discussion in this case because Mr. Jasper is himself an attorney and a former Supreme Court justice and therefore well aware of the rules against extra-judicial discussion of pending cases. As the *Louisville Courier-Journal* editorialized on March 22:

> Richard Givan is hardly a neophyte jurist. He has been on the Indiana Supreme Court for 22 years and served as chief justice. His recent lunch companion, Paul Jasper, wasn't born yesterday, either. He spent five of his 82 years on the court and worked many years for Public Service Indiana.
>
> Both therefore understood the gravity of Mr. Givan's apparently off-handed, but still unforgivable disclosure . . . that a high court

vote would let a controversial PSI rate increase stand.

f. *The appearance of impropriety resulting from the judicial conduct in question was significantly exacerbated by Justice Givan's response to the unusual and unexplained trading activity in PSI stock which occurred concurrently.*

Canon 5(C)(7) of the Indiana Code of Judicial Conduct provides, "Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties." Canon 2, in turn, provides that, "A judge should avoid . . . the appearance of impropriety in all his activities."

Here, of course, there was a close temporal relationship between Justice Givan's *ex parte* disclosure and the unusual, unexplained trading activity in PSI stock. Moreover, Mr. Jasper admitted that he had told "someone" the information imparted to him by Justice Givan, but refused to say who. Only the Securities and Exchange Commission has the legal power and investigatory resources to determine who bought all the PSI stock sold on March 12. But, a reasonable member of the public would certainly question whether there was a causal, as well as a temporal relationship between Justice Givan's disclosure on March 11 and the PSI stock activity on March 12. Indeed, the *Gary Post-Tribune* editorialized on March 26, "Until there is some accounting for the extraordinary trading volume in PSI stock, [Justice] Givan's continued membership on the Supreme Court will be under a cloud." The *Louisville Courier-Journal* called on March 22 for Justice Givan to take "a refresher course in rules governing out-of-court talk," but said, "[I]t's even

more important to remove any stigma of impropriety from a decision that affects many Hoosiers. Mr. Jasper should be encouraged to reveal who learned about the vote from him, and the stock transactions should be carefully analyzed."

The reasonable jurist would also have to question whether an appearance of impropriety had resulted from the subsequent use of the information disclosed by Justice Givan. At the very least, the information Justice Givan disclosed to Mr. Jasper was communicated to Messrs. Mohr, Stein, and Schlegel and almost certainly others associated with the IEA and PSI. A reasonable judge would surely question whether this subsequent communication was casual and inadvertent: the identities and relationships of the persons involved clearly suggests the communication was intended to provide persons who had an interest with advance knowledge of the outcome of the case. In addition, a hypothetical jurist viewing this case objectively would certainly wonder whether the further dissemination of the information disclosed by Justice Givan to Mr. Jasper on March 11 explained the unusual trading in PSI stock which occurred on March 12. Fund America Companies' liquidation program may well explain much, if not most of the *selling* which occurred on March 12, but it cannot explain the *buying*. Because the denial of transfer was an outcome of the litigation favorable to PSI, anyone trading in its stock on the basis of Justice Givan's disclosure would be expected to *buy*, not sell. Consequently, the disclosure is a plausible explanation for the extraordinary *buying* activity in PSI stock which occurred on March 12.

However, Justice Givan's response was very different from that of an objective, detached jurist. After his *ex parte* disclosure to Mr. Jasper had become public, Justice Givan said, according to the *Courier-Journal* of March 20,

> I have no motivation to try to pin [Mr. Jasper] down on what he did because I have the utmost faith in his integrity. He's not involved in any shenanigans of any kind. And no shenanigans happened; nothing happened.

Whether any "shenanigans happened" as a result of Justice Givan's disclosure to Mr. Jasper of the conference vote prior to the entry of the Court's order was clearly an issue here—an issue which neither Justice Givan nor anyone else could resolve simply by reference to his opinion of Mr. Jasper's character. His statement dismissing the whole issue therefore provides an additional grounds for a reasonable member of the judiciary to question Justice Givan's sensitivity to the appearances of impropriety associated with his participation in the decision in this case.

3. This Is A Proper Case To Order The Retroactive Disqualification Of A Judge And Vacation Of An Order.

A judge should disqualify himself retroactively "to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary." *Liljeberg*, 486 U.S. at 861. Here, Justice Givan should have recused himself from the case prospectively at the justices' March 12 conference and not participated in the Court's March 13 order. Having not recused himself prospectively, however, he should have done so retroactively in response to the Coalition's April 2 petition. *Liljeberg*, 486 U.S. at 866-

867. Justice Givan's failure to recuse himself on either occasion meant the Indiana Supreme Court, in a manner highly destructive of public confidence in the judicial system, did not appear to do justice, thereby violating due process. This Court has held that vacation is the proper remedy when a disqualified justice casts a deciding vote on an order of a state supreme court in violation of due process. *Lavoie*, 475 U.S. at 827-828. *Compare Johnson v. Sturdivant*, 295 Ark. at ___, 758 S.W.2d at 416 (holding vacation proper when a disqualified justice authored the opinion even though he did not cast a deciding vote). Consequently, the Indiana Supreme Court's March 13, 1991 order should be vacated and the Coalition's Petition to Transfer reconsidered by the Indiana Supreme Court without the participation of Justice Givan. *Compare Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1050 (Ala. 1987) (on remand); *Johnson v. Sturdivant*, 295 Ark. at ___, 758 S.W.2d at 416 (on rehearing).

4. This Court's Resolution Of The Issue Presented In This Case Is Important To The Administration Of Justice In The States.

According to the article in the March 20 *Louisville Courier-Journal*, Justice Givan stated that the other justices reacted to his disclosure of the Court's conference vote by saying, "Oh well, things like that happen sometimes." It is the Coalition's sincere hope that this reaction is *not* truly reflective of either judicial practice or judicial attitudes toward *ex parte* disclosures of the nature of Justice Givan's. Certainly, the Coalition's diligent search of the case law nationally has yet to reveal *even a single prior instance* of an appellate judge disclosing *ex parte* a court's preliminary conference vote on a pending case prior

to entry of an order or issuance of an opinion as Justice Givan did in this case.

Nevertheless, Justice Givan's portrayal to the public of a state supreme court wholly unconcerned by improper disclosure, and his implication that other justices may themselves "sometimes" make such improper disclosures undoubtedly has wounded public confidence in the judicial system in general and the Indiana Supreme Court in particular. For example, the *Terre Haute Tribune-Star* entitled its editorial "Supreme Disorder" and concluded that "the leak does prove that the Court—especially [Justice] Givan, whose loose lips with an old friend were the source of the leak—has operated in an incredibly sloppy manner that does make one wonder how often this happens." The Indiana Supreme Court's summary denial, without hearing or explanation, of the Coalition's petition for Justice Givan's retroactive recusal and reconsideration of its earlier petition for transfer has simply deepened the wound to public confidence in the Indiana Court and the judicial system opened by Justice Givan.

Citizens of the states look to their supreme courts to remedy unfair situations which arise in the state courts. When a trial or appellate judge fails to recuse himself in circumstances where he or she should, the judge's decision can be challenged in the state supreme court. However, when a justice of a state supreme court refuses to recuse himself, even under the most compelling circumstances like those presented here, the only tribunal in which the refusal can be litigated is the United States Supreme Court.

This Court has held on a number of occasions that the appearance of partiality, and not just its actuality,

can require disqualification of a judge on constitutional, as well as statutory grounds where the judge has a direct, substantial and pecuniary interest in the outcome of a case. *See, e.g, Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). This Court has also held that a non-pecuniary interest of a judge in the outcome of a case can require recusal as a matter of due process. *In re Murchison*, 349 U.S. 133 (1955) (judge who presided over a "one-man grand jury" disqualified from presiding over related contempt proceedings). Moreover, this Court has stated in *obiter dictum* on one occasion recently that there would be certain "extreme cases" where, in the absence of a direct, substantial and pecuniary interest in the outcome of a case, the Due Process Clause would require disqualification of a judge for the appearance of partiality toward a party. *Lavoie*, 475 U.S. at 821.

The Fifth Circuit has enunciated a standard by which to identify those cases. This standard is whether the circumstances give rise to the appearance of partiality in the mind of the "reasonable judge," as distinguished from the "reasonable person" standard of 28 U.S.C. § 455(a) and Code of Judicial Conduct Canon 3(C)(1):

> The inquiry commanded by section 455 and that commanded by the Due Process Clause are not the same. The Due Process Clause requires a judge to step aside when a reasonable judge would find it necessary to do so. Section 455 requires disqualification when others would have reasonable cause to question the judge's impartiality. It is the additional, systemic concern for avoiding the

> appearance of impropriety that makes the section 455 standard for disqualification more demanding than that imposed by the Due Process Clause. At some point the two tests overlap. We conclude that is this area of overlap that the *Liljeberg* court was referring to when it noted that the concern for public perceptions of judicial integrity has 'constitutional dimensions.'

Couch, 896 F.2d at 82.

Because of the aggravating circumstances present here, this is one of the "extreme cases" of the appearance of partiality anticipated in *Lavoie*. As such, it provides the Court with the opportunity to provide crucial guidance to the states with respect to the distinguishing characteristics of such extraordinary cases. It also provides the Court with the opportunity to establish a definitive benchmark which the hypothetical, reasonable judge envisioned by *Couch* could use to apply the due process guarantee to the issue of judicial disqualification in the face of later appearances of partiality. Finally, it provides the Court with the opportunity to eliminate the questionable distinction in constitutional treatment between disqualification based on partiality and disqualification based on interest. *See, e.g.* Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L. J. 455, 500-502 (1986).

CONCLUSION

For the foregoing reasons, the Coalition's petition for a writ of certiorari should be granted.

Respectfully submitted,

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**Counsel of Record*

APPENDIX

IN THE
SUPREME COURT OF INDIANA

CAUSE NO. 93A02-8604-EX-115

CITIZENS ACTION COALITION OF INDIANA, INC., CITY OF TERRE HAUTE, AND SAVE THE VALLEY, INC.,
Appellants,

Vs.

PUBLIC SERVICE COMPANY OF INDIANA, OFFICE OF THE UTILITY CONSUMER COUNSELOR, UNITED MINE WORKERS OF AMERICA-DISTRICT 11, PUBLIC SERVICE INDIANA INVESTORS, INC., INDUSTRIAL ENERGY CONSUMERS GROUP, WABASH VALLEY POWER ASSOCIATION AND INDIANA ASSOCIATION OF CITIES AND TOWNS,
Appellees.

FILED

APR 11 1991

CLERK OF THE
INDIANA SUPREME COURT
COURT OF APPEALS
AND TAX COURT

ORDER

Comes now Citizens Action Coalition of Indiana, Inc., City of Terre Haute, and Save the Valley, Inc., and file "Appellants' Verified Joint Petition for the Recusal Nunc Pro Tunc of Justice Richard M. Givan, for Vacation of Order Denying Transfer, and for Consideration Anew of Petition to Transfer."

This Court having considered Appellant's Joint Petition and being duly advised in the premises now DENIES the petition in all respects.

The Clerk is directed to send a copy of this order to all counsel of record.

DONE AT INDIANAPOLIS, INDIANA THIS 11 day of April, 1991.

/s/ Roger O. DeBruler
ROGER O. DeBRULER
ACTING CHIEF JUSTICE

ALL JUSTICES CONCUR, EXCEPT KRAHULIK J., who is not participating.

IN THE
SUPREME COURT OF INDIANA

CAUSE NO. 93A02-8604-EX-115

CITIZENS ACTION COALITION OF INDIANA, INC.; CITY OF TERRE HAUTE; and SAVE THE VALLEY, INC.,
Appellants,

vs.

PUBLIC SERVICE COMPANY OF INDIANA, INC.; OFFICE OF THE UTILITY CONSUMER COUNSELOR; UNITED MINE WORKERS OF AMERICA DISTRICT 11, PUBLIC SERVICE INDIANA INVESTORS, INC.; INDUSTRIAL ENERGY CONSUMERS GROUP; WABASH VALLEY POWER ASSOCIATION; and INDIANA ASSOCIATION OF CITIES AND TOWNS,
Appellees.

FILED

MAR 13 1991

CLERK OF THE
INDIANA SUPREME COURT
COURT OF APPEALS
AND TAX COURT

ORDER
DENYING "Appellants' Joint Petition to Transfer"

The Appellants sought transfer to this Court after a decision was handed down by the Court of Appeals. *Citizens Action Coalition v. PSI* (1990), Ind.App., 552 N.E.2d 834. The Court has had the opportunity to review the briefs of the parties and the record of the proceedings, as

well as consider the arguments of counsel presented on March 6, 1991.

After thorough deliberation, the four participating members of the Court are evenly divided upon the question of accepting or denying transfer. Pursuant to Ind. Appellate Rule 11(B)(5), "transfer shall be deemed denied and the decision of the Court of Appeals shall be affirmed and becomes the law of the case."

ACCORDINGLY, the Court now DENIES the "Appellants' Joint Petition to Transfer."

The Clerk is directed to send a copy of this Order to all counsel of record.

DONE AT INDIANAPOLIS, INDIANA this 13th day of March, 1991.

/s/ Randall T. Shepard
RANDALL T. SHEPARD
(Chief Justice (for the Court)

Shepard, C.J., and Givan, J., vote to deny transfer, believing that the Court of Appeals has correctly decided the case.

DeBruler, J., votes to grant transfer.
Dickson, J., votes to grant transfer, believing the decision of the Court of Appeals was not correct in all respects.

Krahulik, J., not participating.

Court of Appeals of Indiana,
Third District.

No. 93A02-8604-EX-115.

CITIZENS ACTION COALITION OF INDIANA, INC.; City of Terre Haute; and Save the Valley, Inc.,
Appellants (Intervenors Below),
v.
PUBLIC SERVICE COMPANY OF INDIANA, INC.; Office of the Utility Consumer Counselor; United Mine Workers of America District 11, Public Service Indiana Investors, Inc.; Industrial Energy Consumers Group; Wabash Valley Power Association; and Indiana Association of Cities and Towns,
Appellees (Petitioners and Intervenors Below).

April 12, 1990.

Rehearing Denied May 29, 1990.

Ratepayers groups and city appealed from final order of Public Service Commission approving settlement agreement negotiated by public utility and office of utility consumer counselor, which called for a rate increase to ameliorate utility's precarious financial condition. The Court of Appeals, Hoffman, P.J., held that: (1) Commission did not err when it foreclosed inquiry into prudence exercised by utility in its management of costs of failed nuclear power plant project; (2) Commission did not err in approving accounting procedures permitting overall rate of return for utility of 14.79%, retention by utility of monies collected from ratepayers pursuant to emergency rate increase, or allocation of utility's income tax deductions

for abandonment of failed nuclear project to investors, rather than ratepayers; and (3) Commission did not deprive ratepayers of right to fair and open hearing before impartial decision maker.

Affirmed.

Baker, J., filed dissenting opinion.

Michael A. Mullett, Columbus, for appellant Citizens Action Coalition.

Max E. Goodwin, Mann, Chaney, Johnson, Goodwin & Williams, Terre Haute, for appellants City of Terre Haute and Save The Valley, Inc.

Jon D. Noland, Duejean C. Garrett, Public Service Company of Indiana, Inc., Plainfield, Virgil L. Beeler, Fred E. Schlegel, Mary M. Stanley, Baker & Daniels, Indianapolis, for appellee Public Service Company of Indiana, Inc.

Jerry Jacobi, Robert K. Johnson, Indianapolis, for appellee Office Of Utility Consumer Counselor.

HOFFMAN, Presiding Justice.

Intervenors-appellants Citizens Action Coalition of Indiana, Inc.; City of Terre Haute; and Save the Valley, Inc. (collectively referred to as "Citizens") appeal from the final order of the Public Service Commission of Indiana[1] ("Commission") approving a settlement agreement negotiated by petitioner-appellee Public Service Company of Indiana, Inc. ("PSI") and intervenor-appellee Office of the Utility Consumer Counselor ("UCC"). In its order, the Commission authorized a rate increase to ameliorate PSI's precarious financial condition resulting from the abandonment of the Marble Hill nuclear project.

---

[1] The Commission is now called the Indiana Utility Regulatory Commission.

Citizens raises the following issues on appeal:

(1) Whether Commission erred when it foreclosed inquiry into the prudence exercised by PSI in its management of the Marble Hill Project.

(2) Whether the Commission erred by approving the accounting procedures identified below:

a. The authorization of an overall rate of return for PSI of 14.79%;

b. the retention by PSI of $75 million collected from ratepayers pursuant to an emergency rate surcharge; and

c. The allocation of PSI's income tax deductions from the Marble Hill abandonment loss and the Marble Hill interest expense to the investors.

(3) Whether the Commission deprived Citizens of its right to a fair and open hearing before an impartial decision-maker.

I.

Citizens first alleges error in the Commission's ruling that prudence was an inappropriate standard to be applied in determining how best to alleviate the emergency situation with which PSI was confronted. In support of its argument, Citizens relies upon the maxim of rate-making that a utility may not recover through rates those costs attributable to management imprudence. *See West Ohio Gas Co. v. Public Utilities Commission of Ohio* (1935), 294 U.S. 63, 68, 55 S.Ct. 316, 319, 79 L.Ed. 761; *Board of Dir. for Util. v. Office of Utility* (1985), Ind.App., 473 N.E.2d 1043, 1053; *L.S. Ayres & Co. v. Indianapolis Power & Light Co.* (1976), 169 Ind.App. 652, 657, 351 N.E.2d 814, 819. The validity of that maxim remains undisputed.

However, an inquiry as to the prudence of the expenses incurred in constructing Marble Hill was neither relevant

nor necessary in the proceeding below. Whether the expenses were prudently or imprudently incurred, none of the costs expended by PSI for the failed Marble Hill project were chargeable to the utility's ratepayers. *Northern Indiana Public Service Co. v. Citizens Action Coalition* (1989), Ind., 548 N.E.2d 153, 156.

II.

For its second issue, Citizens challenges the Commission's approval of various accounting procedures proposed by PSI and UCC in their settlement agreement. Citizens contends, for example, that the Commission erred when it approved an overall rate of return for PSI of 14.79%.

The rate of return established by the Commission is a ratio of "return" to "rate base." *L.S. Ayres & Co., supra*, 169 Ind.App. 652, 351 N.E.2d 814, 820. The utility's revenues minus its expenses, exclusive of interest, constitute the earnings or the "return" that is available to be distributed to the utility's investors. *Id.* at 657, 351 N.E.2d at 819. The "rate base" consists of that utility property employed in providing the public with the service for which rates are charged and constitutes the investment upon which the return is to be earned. *Id.* at 658, 351 N.E.2d at 820. The Commission's primary objective is to ascertain whether the ratio of return to rate base is deficient, adequate or excessive, thereby establishing a fair rate of return. *Id.* at 659, 351 N.E.2d at 820-821.

The Commission in the instant proceeding made the following finding with respect to PSI's rate of return:

> "[T]he Commission hereby determines that a fair rate of return for [PSI] is 9.90% on the fair value rate base of $2,396,291,000 . . . .
>
> Although this produces a higher rate of return (14.79%) on the jurisdictional net original cost of PSI's property than that allowed in PSI's last general rate

> case (11.75%), we find that such higher return is justified by the extreme and unique emergency conditions confronting [PSI]. . . .
>
> When the Marble Hill investment is written off the books of the company, the equity account, sometimes referred to as a book value of equity, will result in a negative $283 million. Prior to the write-off, the company's equity account is $1.474 billion. . . . [I]t is essential, if this company is ever to be returned to financial health, that a rate of return be granted that takes into account the risk premium created by the radical contraction of the company's capital base. Such premium, according to witness Perry, can reasonably be as much as 3.25%. Based on the normal rate of return granted [PSI] in its last normal rate case, such premium would permit a return on original cost rate base in this proceeding of up to 15%. We find this to be within the range of reasonableness dictated by the statutory requirements inherent in this emergency situation."

The Commission evaluated the various risks which were unique to PSI and concluded that a risk premium should be added to the return normally allowed a utility. Citizens maintains that the Commission impermissibly shifted the costs of Marble Hill to the ratepayers by authorizing a rate of return that took into account the risk premium created by the failed project.

Although the Commission granted rate relief to PSI, the result was achieved with the specific exclusion from the rate base of the costs of the cancelled facility. The rate relief may have been required because of the cancellation of the Marble Hill nuclear project. However, the Commission made it clear that the costs of the project were not going to be recovered through the rate increase. The Commission did not violate the proscription against charging ratepayers with the costs expended by a utility for a power

plant that never became used and useful property. *Accord Nat. Rural Util. Co-op. Fin. v. P.S.C.* (1988), Ind.App., 528 N.E.2d 95, 103 (discussing with approval the addition of a risk premium to the utility's normal return, as the result was reached with the specific exclusion from the rate base of the costs of the cancelled facility).

Citizens argues in the alternative that the rate of return of 14.79% was not supported by substantial evidence of record. According to Citizens, the risk premium authorized by the Commission was based upon the testimony of one witness, Perry, whose opinion was not supported by exhibits, surveys, comparisons or other data. Citizens characterizes Perry's testimony as a "scintilla of evidence."

The appropriate standard of judicial review of a Commission order has two levels. The Commission's decision must first contain specific findings of fact on all determinations material to its order. Secondly, the reviewing court must ascertain whether there is substantial evidence in light of the record to support the Commission's findings of fact. In reviewing the sufficiency of the evidence, the court on appeal will neither weigh the evidence nor substitute its judgment for that of the Commission. *Habig Trucking v. Public Service Com'n* (1984), Ind.App., 466 N.E.2d 484, 487.

Witness Perry testified that "[t]here should be a risk premium because of insolvency and thin equity position over the rate of return granted in the last general rate case of a range of a high of 3.25% to a low of 1% in the four year period." Additional evidence identified the unique risks faced by PSI: the inability to access short- and long-term capital markets, a serious cash flow deficiency, inflated cost of equity capital and insolvency. A review of the record confirms that there was sufficient evidence to support the Commission's addition of a risk premium to the normal rate of return.

The second accounting procedure to which Citizens takes exception resulted in the retention by PSI of $75 million collected from ratepayers pursuant to an emergency rate surcharge. In an order dated March 8, 1984, the Commission authorized a 5% emergency rate surcharge for PSI. The Commission's order provided that the revenues from the surcharge "will be separately accounted for and will be deducted from the Marble Hill investment to be amortized." The amortization and recovery through rates of the sunk costs of a cancelled nuclear project were deemed impermissible by the Supreme Court in *Citizens Action Coalition v. Northern Indiana Public Service Co.* (1895), Ind., 485 N.E.2d 610, 614. Consequently, the Commission ruled:

> "The surcharge revenues previously collected will be retained by PSI and will be reflected in net income during the period collected. . . .

Citizens perceives the Commission's ruling as a breach of the terms of the settlement agreement upon which the emergency rate surcharge was based. Under the terms of the settlement agreement, the emergency rate surcharge was intended to serve two purposes; 1) to provide PSI with income to meet its franchise and contractual obligations and 2) to reduce the amount of the Marble Hill investment to be amortized.

The Commission determined that PSI met its obligations as they became due principally because of the 5% interim emergency surcharge. Moreover, the amount of the Marble Hill investment to be amortized was reduced to zero. Such a reduction was accomplished by operation of law and not by deduction of the surcharge revenues from the value of the investment. *See Citizens Action Coalition v. Northern Indiana Public Service Co.* (1985), Ind., 485 N.E.2d 10, 614 (prohibiting amortization and the recovery through rates of the sunk costs of a cancelled nuclear project). Nonetheless, the intent of the settlement agreement was

fully satisfied. The Commission's determination that the surcharge revenues should be reflected as net income during the period collected did not violate the agreement underlying the March 8, 1985 order.

An alternative argument raised by Citizens characterizes the Commission's ruling as an attempt to charge retroactively the provisions of the March 8, 1984 order. Admittedly the order was changed to the extent that the surcharge revenues were not deducted from the Marble Hill investment to be amortized. Yet this change was the result of the Supreme Court decision prohibiting amortization and may not be viewed as a retroactive amendment by the Commission in excess of its statutory authority.

Citizens also alleges error in the Commission's approval of PSI's accounting and rate-making treatment of its income tax deduction for the Marble Hill abandonment loss and Marble Hill interest expense. PSI's abandonment during 1984 of its investment in Marble Hill produced a tax loss well in excess of PSI's 1984 taxable income. Hence a net operating loss was generated which could be carried back to each of the three preceding years and forward for up to fifteen years to offset future taxable income. Additionally, PSI incurred $183.8 million in deductible interest expense. Because the deductions were associated with the Marble Hill nuclear project, the Commission assigned the tax benefits to the shareholders who funded the construction.

Citizens avers that the Commission erred by allocating the income tax deductions in such a way as to create a hypothetical tax liability for rate-making purposes. A fundamental principle in rate proceedings is that the Commission may not fix rates based upon a hypothesis or a situation never in existence. *Public Service Commission v. City of Indianapolis* (1956), 235 Ind. 70, 91, 131 N.E.2d 308, 317. From this general rule is derived the requirement that the Commission make some determination of the ac-

tual tax liability of the utility rather than use a hypothetical figure. *See Federal Power Commission v. United Gas Pipe Line Co.* (1967), 386 U.S. 237, 244, 87 S.Ct. 1003, 1007, 18 L.Ed.2d 18; *Office of Utility Consumer Counselor v. Indiana Cities Water Corp.* (1982), Ind.App., 440 N.E.2d 14, 15-16; *Office of Public Counselor v. Indiana & Michigan Electric Co.* (1981), Ind.App., 416 N.E.2d 161, 168; *City of Muncie v. Public Service Commission* (1978), 177 Ind.App. 155, 158, 378, N.E.2d 896, 898.

Yet this Court has allowed the Commission to depart from a determination of actual tax liability when the savings in income tax are realized through deductions associated with construction.

> "[T]he Commission is prohibited from including the value of the construction work in progress in the utility's rate base, for such property has not yet achieved the status of property '*actually used and useful* for the convenience of the public.' Because the construction work in progress is not included in the rate base, the customer is not paying any return on the investment. Therefore, since the customer is neither contributing to the costs of work in progress nor paying any return on the investment in that work, he should not be entitled to the tax benefits associated with the construction costs. Those benefits should in fact be passed on to the investor as a return on his capital." [Citations omitted.] *Capital Improvement Bd. etc. v. P.S.C.* (1978), 176 Ind.App. 240, 270, 375 N.E.2d 616, 637; *see also Office of Utility Consumer Counselor v. P.S.C.* (1983), Ind.App., 449 N.E.2d 604, 607.

The rationale behind the exception for construction-related deductions is equally applicable to deductions associated with a cancelled nuclear project. The value of the nuclear project may not be included in the utility's rate base, as the property never achieved the status of property actually used and useful for the convenience of the public.

See Citizens Action Coalition v. Northern Indiana Public Service Co. (1985), Ind., 485 N.E.2d 610, 614. In addition, the customer may not be asked to contribute to the costs of the failed project. *See id.* The customer, therefore, is not entitled to the tax benefits associated with the cancellation of a nuclear project. *Accord Nat. Rural Util. Co-op. Fin. v. P.S.C.* (1988), Ind.App., 528 N.E.2d 95, 103 (viewing the assignment to the investors of the tax benefits associated with the cancellation of a nuclear project as evidence that the ratepayers were not being held responsible for the costs of the failed project). There was no error in the Commission's order assigning the income tax deductions to the investors for rate-making purposes.

III.

The final issue brought before this Court states that the Commission deprived Citizens of its right to a fair and open hearing before an impartial decision-maker. According to Citizens, bias on the part of the Commission was demonstrated by the following:

1. Commission Chairman Montgomery privately communicated with the officers of two banks which were co-managers of PI's revolving credit facility;

2. The Commission stated in its ruling on the motion to dismiss PSI's petition for permanent rate relief that the Commission had anticipated the need for such relief;

3. Commission Chairman Montgomery remarked during cross-examination of a PSI witness, "We are not here in the business of impeaching witnesses or cutting at their credibility. . . .";

4. Commission Chairman Montgomery engaged in communications with members of the Governor's staff;

5. The Commission denied Citizens' motion for an extension of time to conduct discovery;

6. The Commission admitted into evidence written testimony which had been pre-filed only four days in advance of the hearing; and

7. The Commission considered rate relief scenarios developed by staff members, which exhibits were not a part of the record.

Citizens first urges this Court to infer bias from a luncheon meeting between Commission Chairman Montgomery and the officers of two banks that had a financial interest in the outcome of the proceeding below. To support its position, Citizens relies upon the due process requirement codified at IND. CODE § 8-1-1-5(e) (1988 Ed.):

> "Except as otherwise provided in this chapter, no member or employee of the commission assigned to make findings of fact and conclusions of law in a formally docketed evidentiary proceeding may communicate in connection with any issue of fact or law disputed in that proceeding with any party or his representative, except on notice and with opportunity for all parties to participate."

Because the banks were not parties to the proceeding, Commission Chairman Montgomery's meeting with officers of the banks did not violate IND. CODE § 8-1-1-5(e). An inference of bias on the basis of that luncheon meeting is not sustainable.

Citizens next asserts that the Commission became a proponent for PSI on the issue whether PSI would receive rate relief in addition to the 5% interim surcharge. Citizens focuses upon the following language in the Commission's ruling on a motion to dismiss PSI's petition for permanent rate relief:

> "It has always been anticipated that more permanent rate relief would be required to achieve that goal [of returning PSI to some semblance of financial health]."

An examination of the Commission's ruling, in its entirety, discloses that the Commission was not advocating rate relief. Rather, the Commission was commenting upon the continued threat to PSI's financial integrity.

Remarks made by Commission Chairman Montgomery during cross-examination of a PSI witness are cited by Citizens as evidence that the Commission disregarded its duty to judge the credibility of the witnesses. The chairman stated,

> "I would simply make the observation from the Commission's point of view that we are in an administrative forum rather than a trial court, and for those of you who are perhaps not used to operating in front of administrative bodies, it is very different from a trial court setting. There is no jury that needs to be convinced. The Commission is a very different type of setup and while we recognize that there will be probably no more important case to come before us this year. If fact A and fact B are established, the Commission is quite capable of drawing conclusions from those facts. We are not here in the business of impeaching witnesses or cutting at their credibility or badgering them or, in fact, impeaching them."

Immediately following the chairman's remarks, the presiding Chief Administrative Law Judge clarified that "impeachment does have a place in this proceeding to the extent that it bears on the weight and credit to be given a piece of evidence." Moreover, the Commission specifically referred to the credibility of the witnesses in its final order.

> "A majority of the Commission has attended virtually all of the evidentiary hearings and has thus observed

> the demeanor and credibility of the witnesses in reaching the findings set forth herein."

The Commission fully discharged its duty to assess witness credibility.

Citizens returns to IND. CODE § 8-1-1-5(e) in its argument that bias was evidenced by ex parte communications between Commission Chairman Montgomery and members of the Governor's staff. The Governor's legal counsel asked Montgomery to delay issuing a decision in the proceeding so that UCC and PSI could negotiate a settlement. The Governor's executive assistant privately asked Montgomery to allow sufficient time and notice for a fair hearing on the settlement. Citizens stresses that the members of the Governor's staff were acting at the behest of and on behalf of UCC, a party to the proceeding.

Yet even if the staff members were representatives of UCC, their conversations with Commission Chairman Montgomery were not condemned by IND. CODE § 8-1-1-5(e). That statute prohibits ex parte communications as to "any issue of fact or law disputed." The conversations recounted by Citizens did not involve disputed issues of fact or law.

For its next allegation of bias, Citizens complains that the Commission denied its motion for an extension of time to conduct discovery regarding the settlement agreement negotiated by UCC and PSI. On January 31, 1986, UCC petitioned for a hearing to consider new evidence, namely the settlement agreement between UCC and PSI. The hearing was set for February 24, 1986, and a discovery deadline of February 14, 1986 was established. Citizens moved for an extension of time to March 27, 1986, to discover evidence relating to UCC's petition to adopt the settlement agreement. No extension of time was granted.

An examination of the record indicates that Citizens had been apprised concerning the on-going negotiations for a

settlement of the case. Citizens had taken depositions, submitted interrogatories and sought the production of documents relating to the settlement agreement. By denying Citizens' motion to extend the period for discovery, the Commission neither abused its discretion nor demonstrated bias.

Citizens suggests that the impartiality of the rate proceeding was undermined when the Commission admitted into evidence written testimony which had been pre-filed only four days in advance of the hearing. Citizens contends that such leniency on the part of the Commission was in violation of the rules governing the proceeding.

The rule to which Citizens refers is found at 170 I.A.C. 1-1-17(j):

> "The direct testimony of a witness may be presented in writing. Such written testimony shall be prepared in question and answer form and shall be accompanied by any exhibits to which the testimony relates. In any utility rate proceeding, *unless otherwise provided in any prehearing conference order* or by stipulation of the parties, such prepared testimony and exhibits shall be filed with the Commission and served on all parties at least fifteen (15) days prior to the date of the hearing at which the same is to be offered into evidence." [Emphasis added.]

Discretion on the part of the Commission in ordering the pre-filing of testimony closer to the hearing date is contemplated by the rule. The Commission in the proceeding below exercised such discretion. In a docket entry dated February 7, 1986, the Commission provided for the pre-filing of any written evidence four days in advance of the hearing. A finding of bias may not be premised upon the Commission's admission into evidence of testimony pre-filed in accordance with its docket entry.

Lastly, Citizens alleges bias because the Commission considered rate relief scenarios developed by Commission

staff members, which exhibits were not made a part of the record. According to Citizens, the consideration of such rate relief scenarios constituted reliance upon evidence not in the record.

The rate relief scenarios consisted of "mathematical worksheets based upon evidence of record which provide no narrative description, analysis or recommendation, and in no way comment on the quality or nature of the underlying evidence." The Commission explained that the function served by the rate relief scenarios in the final analysis was of minimal importance:

> "Based upon our expertise and relying wholly upon evidence contained in the record, the Commission has considered other rate relief scenarios to further evaluate the reasonableness of the rate relief proposed in the Settlement Agreement."

Certainly, the better practice would have been for the Commission to make the rate relief scenarios part of the record, pursuant to IND. CODE § 8-1-1-5(b) (1988 Ed.). The inquiry is whether Citizens was denied a fair and impartial hearing, however. The Commission's consideration of the rate relief scenarios did not serve to deprive Citizens of a hearing before an impartial decision-maker. The order of the Commission is affirmed.

GARRARD, J., concurs.

BAKER, J., dissents with opinion.

BAKER, Judge, dissenting.

I dissent.

In an attempt to entomb the travesty of Marble Hill, the Commission has engaged in legerdemain, which the majority today affirms.

The majority has allowed the Commission to grant PSI a risk premium based on the Commission's finding that PSI's financial difficulties amount to an emergency. *Commission Order* of 3/7/86 at 14. I find the majority's reasoning flawed in two respects.

I.

First, as the majority correctly notes, a utility cannot shift to its rate payers the investment burdens of an abandoned project that never became used and useful property of the utility. *Citizens Action Coalition of Ind., Inc. v. Northern Ind. Pub. Serv. Co.* (1985), Ind., 485 N.E.2d 610. In determining a reasonable rate of return for PSI, the Commission excluded from PSI's rate base the costs of the Marble Hill project. This did not satisfy the requirements of *Citizens Action Coalition, supra*, however, because PSI's financially dire straits are directly attributable to the Marble Hill fiasco. The Commission relied on evidence that PSI's writing off of Marble Hill "could bring PSI precariously close to bankruptcy." *Commission Order, supra*, at 13. Moreover, in his concurrence with the order, Commissioner O'Lessker noted:

> We should not let ourselves be deceived by our own rhetoric about the disposition of the Marble Hill issue. The company, the consumer counselor, and the language in this order all give the impression that Marble Hill is behind us and that the rate payers will never have to bear its financial burdens. This interpretation of what we are doing here today seems to me, at best, disingenuous. The plain fact of the matter is that both the 5% emergency surcharge granted in 1984 and the 8.2% increase we are approving today are directly attributable to the financial catastrophe that Marble Hill became.

Appellants Brief at 23-24. In essence, then, the Commissioner's order provides for exactly that which is prohibited; that is, the recovery of costs for property that never became used and useful, thereby violating the rule of *Citizens Action Coalition, supra. See also L.S. Ayres & Co. v. Indianapolis Power & Light Co.* (1976), 169 Ind.App. 652, 351 N.E.2d 814, and *Public Ser. Comm. v. Indiana Bell Telephone Co.* (1955), 235 Ind. 1, 130 N.E.2d 467.

The emergency for which the Commission granted relief is a crisis of confidence in the capital and credit markets. Because of the Marble Hill losses, PSI has had difficulty in accessing short and long term credit and long term capital, its investment ratings have suffered, and its earnings have declined. *Commission Order* of 3/7/86 at 14. By granting the risk premium, however, the Commission has improperly made PSI's consumers the insurers of PSI's investors. The Commission regulates utilities "to protect the consumers from the abuses of monopoly i.e. artificially high prices." *Citizens Action Coalition, supra*, 485 N.E.2d at 614. The Commission has a responsibility to approximate the conditions of a competitive market in the monopoly market of public utilities. In discharging this responsibility, the Commission of necessity, takes into account the responsibilities of utility investors and consumers. *Id.* at 614, 615. The responsibilities of consumers include paying a fair return on investor's capital, and paying taxes and operating costs. *Citizens Energy Coalition v. Ind. & Mich. Elec. Co.* (1979), Ind.App., 396 N.E.2d 441, 445, *trans. denied.* It is well established, however, "that the company's *investors, not* the consumers, must contribute the working capital." *Id.* (emphasis added). The Commission's order illegally places the burden of acquiring capital squarely on the consumer and should not be allowed.

II.

Second, the majority erroneously concludes that a prudence inquiry was not required because "[w]hether the expenses were prudently or imprudently incurred, none of the costs expended by PSI for the failed Marble Hill project were chargeable to the utility's rate payers." *Majority Opinion* at 837. If the majority is correct that the costs of Marble Hill are not being shifted to the rate payers, then an inquiry was required to determine management's prudence not relating to Marble Hill, but rather within the

context of the financial emergency alone. If an inquiry reveals no imprudence in the precipitation of the emergency, then rate relief is proper. An inquiry into management's prudence in the context of the emergency was required here for two reasons.

First, IND. CODE § 8-1-2-48 places the Commission under an affirmative duty to inquire into a utility's management practices and to exclude any item of expense which is unnecessary or excessive in setting that utility's rates. The duty imposed by IND. CODE § 8-1-2-48 is absolute and continuous: "[t]he commission *shall inquire* into the management of the business of *all* utilities . . ." (emphasis added). This is not precatory language. "The use of the word 'shall' in a statute must be construed as being used in its imperative and mandatory sense." *American Vitrified Prod. Co. v. Public Serv. Comm.* (1961), Ind.App., 176 N.E.2d 145, 153, 40 P.U.R.3d 164, 174 (citing *State ex rel. City of Indianapolis v. Brennan, Judge* (1952), 231 Ind. 492, 498, 109 N.E.2d 409, 411). Surely, in a situation in which the Commission grants a utility between $450 million and $720 million in rate increases, the requirements of IND. CODE § 8-1-2-48 apply and mandate a prudence inquiry.

The Commission was also obliged to inquire into the prudence of PSI's management because the provisions of IND. CODE § 8-1-2-113 do not allow for emergency rate relief when management imprudence causes the emergency. In *State ex rel. Indianapolis Traction & Terminal Co. v. Lewis* (1918), 187 Ind. 564, 120 N.E. 129, our supreme court required the Public Service Commission to take jurisdiction over a petition for emergency relief by a streetcar company whose ability to provide service and make a profit had been ravaged by the inflation caused by World War I. The court specifically disclaimed any requirement that the Commission hear an emergency petition based solely on threatened insolvency because such a "condition may have arisen through negligent or careless

management, lack of business capacity, or otherwise, and far from being within the meaning of the word 'emergency' as used in the statute." 187 Ind. at 572, 120 N.E. at 131. We in the appellate courts are bound by this cautionary message. Under *Lewis*, a petitioner must allege more than mere insolvency for the Commission to take jurisdiction over a petition for emergency relief. When the Commission does take jurisdiction, therefore, it cannot grant relief on the basis of insolvency resulting from imprudence.

Here, PSI sought relief based on a financial emergency threatening insolvency. Before the Commission could grant emergency relief in this situation, it had to conduct a prudence inquiry to comply with IND. CODE § 8-1-2-48 and the rule of *Lewis, supra.*

I dissent and would reverse and remand with instructions to the Commission to permit a prudence inquiry.

Indianapolis Star
March 16, 1991

Possible 'insider' trading found day before PSI ruling

By SUSAN HANAFEE
STAR STAFF WRITER

The day before the Indiana Supreme Curt issued an order favorable to PSI Energy Inc., word of the outcome was accidentally leaked.

That same day, more than 1.3 million shares of PSI stock were traded on the New York Exchange. The activity, well above the 152,000 shares normally traded, had little effect on the stock's price, however.

Trading stock based on non-public, or "insider," information is illegal.

Court officers are uncertain what happened but have put out the word to employees to "be more careful."

PSI officials, also interested in the high volume of trading that day, said a firm named Fund American Companies sold a million shares. PSI does not know who the buyers were.

Fund American, of Novato, Calif., is a major PSI investor and had been trading large blocks of the company's stock recently, said a PSI official.

"They had an offer to sell out for several weeks and sold at the low for the day," said Leigh J. Pefley, PSI's executive director of investor relations.

While the link between the leak of the decision and the stock trading is unclear, an attorney involved in the PSI case is planning to alert the Securities and Exchange Commission.

Michael A. Mullett, attorney for Citizens Action Coalition, said his organization was told early Tuesday after-

noon by a reporter that the court order might be made public that day.

The reporter was alerted by a tipster that the outcome of the case might be a tie.

CAC had joined two other groups in protesting the increases and was upset at the possible loss of the case.

On Wednesday, the court released its 2-2 order. In doing so, it let stand 1986 rate increases ordered for PSI after the utility abandoned its Marble Hill nuclear power plant. The order upheld a 1990 Indiana Court of Appeals ruling.

On Thursday, Mullett was reviewing the recent trading activity of PSI stock when he noticed Tuesday's large volume.

Since then he has been trying to "determine if we have something that warrants filing a complaint with the SEC," he said.

Mullett said he will decide by next week what action to take.

Meanwhile, court officials said they have looked into the leak but would not comment directly on it.

Karl L. Mulvaney, Supreme Court administrator, said there was some confusion about the justices' votes early on. During the delay before the release of the order Wednesday, some information may have been released inadvertently.

"The issue is over as far as I can tell," he said. "I don't think either side has gained any advantage out of the error.

"Everybody has been given the renewed word to be careful."

Richard P. Stein, a former PSI executive and now a lobbyist with the company, said he was checking out a street rumor when he called a reporter with the tip.

Stein asked the reporter to check if it was true that the order was being released Tuesday.

Stein would not say who passed the information to him, but he added he did not act on it or call company officials about it.

When the reporter called Stein back to say the order had not been filed. Stein said he let the matter drop.

Louisville Courier-Journal
March 20, 1991

Justice Givan revealed PSI ruling prematurely

By MARY DIETER
Staff Writer

INDIANAPOLIS—Indiana Supreme Court Justice Richard M. Givan was the source of the leak of a court decision favorable to PSI Energy last week, The Courier-Journal has learned.

The decision on a case regarding the Marble Hill nuclear power plant was not made public until two days after the leak—and a day after an unusually large volume of PSI stock was traded—causing some people to raise red flags about whether that trading was proper.

Givan, a justice for 22 years and formerly chief justice for 12, said yesterday that, at lunch on March 11, "I just in passing happened to mention to a person that the order had gone down, that we were tied (in the voting) and that the Court of Appeals opinion . . . was left standing."

His lunch companion was Paul G. Jasper, a former state Supreme Court associate justice. Jasper, 82, left the court in 1953 to go to work for PSI and now works part-time as secretary-treasurer of the Indiana Electric Association, an industry organization.

The high court's 2-2 vote on the case meant it let stand a Court of Appeals ruling upholding the 1986 electric-rate increase PSI secured from the state Utility Regulatory Commission.

Opponents—the Citizens Action Coalition, Save the Valley Inc. and the city of Terre Haute—had appealed the commission's ruling, contending that it unlawfully forced PSI customers to pay part of the $2.8 billion cost of the abandoned Marble Hill nuclear plant.

If the Supreme Court had overturned the earlier ruling, PSI would have had to refund $300 million to $500 million to its customers, and the price of its stock probably would have plummeted.

The ruling in favor of PSI "has removed a significant uncertainty and potential roadblock to our continued financial recovery," J. Wayne Leonard, PSI's vice president and chief financial officer, said in a prepared release.

Oral arguments were presented Wednesday, March 6, and Givan said the justices voted that same day. He said he mistakenly thought the order was prepared the next day, Thursday, and that it was sent to the clerk's office—which would have released it to the public—on Friday. But the order was held up when some justices reconsidered their votes, court administrator Karl Mulvaney said. Consequently, the order was not sent to the clerk's office until the following Wednesday, March 13.

Meanwhile, Givan, Jasper and some Supreme Court personnel had lunch on Monday, March 11. And on Tuesday, March 12, 1.33 million shares of PSI stock—nearly 10 times the average daily volume—were traded.

Michael A Mullett, attorney for the Citizens Action Coalition, said his consumers' organization is disturbed by the events. "Every lawyer, every judge knows that it's not proper to discuss a pending decision prior to the publication of the decision in that case. For a justice of the Supreme Court to break that basic rule is not only hard to believe, it's hard to accept."

Givan acknowledged that, "certainly in retrospect, I would have been well-advised before I said anything to anybody to make sure that it was in fact in the clerk's office. It just didn't occur to me that it wasn't."

But he said he did not violate the Code of Judicial Conduct, which says that "a judge should abstain from public

comment about a pending or impending proceeding in any court."

Said Givan: "Had I known that it wasn't down (in the clerk's office) and told him, I'd have violated the code. But I was just mistaken."

Mullett said that the coalition will evaluate whether to file a complaint with the state's Commission on Judicial Qualifications. Bruce Kotzan, the judicial commission's executive director, said the panel also can take up matters on its own motion.

Mullett also fears that "the judicial system being compromised could have led to the financial system being compromised. I have a hard time thinking of a situation that is . . . more troubling from an ethical, social, societal perspective."

"We can't confirm that there's insider trading," Mullett said, but "unusual, suspicious activity" took place in the stock market after the leak occurred.

Most of the 1.33 million shares of PSI stock traded March 12 were sold by Fund American Cos., Inc., the parent company of Fireman's Fund Insurance. Fund American that has been selling PSI stock since Fund American was acquired by a German company last year.

Fund American had been offering a large block of PSI stock for sale for the past several weeks, said Leigh Pefley, PSI's executive director of investor relations. It was a co-incidence that buyers came along on March 12, she said.

Neither PSI nor Fund American knows who the buyers were, although Fund American, as the seller, could find out if it wished. "This is not an issue for us," said George Wyper, Fund American's vice president for investments.

Robert Campbell, a financial adviser to Fund American, said, "I would consider it a non-event, and the marketplace bears that out."

More than a million of the shares were sold at $17\frac{1}{4}$ ($17.25), the low for the day; the stock opened at the high for the day, $17\frac{5}{7}$.

That the price of the stock did not skyrocket because of demand suggests to come people, including Givan, Pefley, Wyper and Campbell, that insider trading could not have occurred.

But, Mullett said, "From an ethical standpoint, it clearly does not make a difference." If someone used the information from Givan to try to make a fast buck, that constitutes a technical violation of the law, he said.

He contends that the price may have stayed down because the market had already discounted PSI stock as a result of the earlier Court of Appeals ruling, because Fund American's large sale caused a glut of PSI stock on the market and because some investment advisers recently have recommended selling PSI stock.

The Citizens Action Coalition has already sent information about the matter the federal Securities and Exchange Commission, which oversees, the stock market. William McLucas, director of the SEC's enforcement division, said he was not free to comment on potential or pending investigations.

Mullett said he is also researching whether Givan's leak is sufficient reason for the justice to remove himself from the case. Technically, the case is over as far as Givan is concerned because of the high court's decision, although the opponents still could appeal it to the U.S. Supreme Court. Indiana court rules prohibit the opponents from petitioning for another hearing before the state Supreme Court.

Still, Mullett said, there is case law suggesting that, even after a case is concluded, if a situation comes to light that would reasonably question a judge's objectivity, the judge should remove himself. In such a situation, the court could decide on its own to rehear the case.

If that happened, the vote likely would be 2-1 in favor of the court's accepting case, and it's possible that the Court of Appeals decision would be overturned. (The court's fifth member, Associate Justice Jon Krahulik, had earlier removed himself from the case because his former law firm was once involved in it.)

Asked if the court might take up the case again, Chief Justice Randall T. Shepard said, "I'm not going to muse on the merits or the likelihood of a question like that."

Jasper, who sat on the high court from 1948-53, said he did not know how many people he told about the court decision. But the leak was first publicly acknowledged in a story last Saturday in the Indianapolis Star, which quoted Richard Stein, a PSI lobbyist who previously worked as the utility's senior vice president for public affairs, as a source.

Jasper worked for PSI from April 1953 until Jan. 1, 1974, most recently as vice president and special counsel, said PSI spokeswoman Pam Chapman. He and Givan have been friends since Jasper was an associate justice and Givan worked in the court's law library.

Givan said he has no plans to discuss the matter with Jasper.

"We're friends and I suppose it will probably come up in a conversation, but I have no motivation to try to pin him down on what he did because I have the utmost faith in his integrity," Givan said. "He's not involved in any shenanigans of any kind. And no shenanigans happened; nothing happened."

Shepard, who succeeded Givan as chief justice, said Givan "feels a sense of embarrassment, having inadvertently let some information slip." Givan said that his fellow justices did not admonish him for the incident.

"I just told them what happened and they said, 'Oh well, things like that happen sometimes.' We all understand the situation. They don't have to tell me."

Indianapolis Star
March 21, 1991

Supreme Court justice leaked PSI ruling to ex-utility lawyer

By SUSAN HANAFEE
STAR STAR WRITER

The outcome of a court order favorable to PSI Energy Inc. was leaked during lunch between an Indiana Supreme Court justice and a longtime friend.

Justice Richard M. Givan said Wednesday he thought the Supreme Court order already had been made public when he casually mentioned its contents to Paul G. Jasper two days before its release.

Jasper, 82, is a former PSI vice president and former special counsel. He and Givan have known each other since 1949.

The lunch occurred March 11. On March 13, the court released the order that let stand the 1986 rate increases ordered for PSI after the utility abandoned its Marble Hill nuclear power plant near the Ohio River.

The order upheld a 1990 Indiana Court of Appeals ruling.

The day after the luncheon between Givan and Jasper, more than 1.3 million shares of PSI's stock were traded on the New York Stock Exchange.

The activity was well above the 152,000 PSI shares normally traded. It prompted a pro-consumer group to speculate late last week that insider trading might have occurred as a result of the leak.

Trading stock based on non-public, or "insider," information is illegal.

But the unusually high volume of trading had little effect on the stock price. It closed down 12.5 cents a share to $17.50 from the day before.

PSI officials said 1 million shares were sold by Fund American of Novato, Calif., which had an offer to sell for several weeks. PSI could not account for the 300,000 other shares.

Jasper said Wednesday he mentioned the court order to someone after his lunch with Givan. He could not remember whom he told.

"It was purely accidental—normally we (he and Givan) never discuss cases," said Jasper, who now is employed part time by the Indiana Electric Association, an organization made up of the state's largest electric utilities, including PSI.

Richard P. Stein, a PSI lobbyist, became aware of the information, but has said he did not act on it.

Givan said the justices voted shortly after the PSI case was argued on March 6. The order was written and signed the next day. He assumed it was filed with the clerk and made public.

He did not learn of the delay until the day after his lunch with Jasper, when the order and a possible leak were discussed at the justices' conference.

The justices had been alerted to the leak through inquiries by *The Indianapolis Star*.

Givan confessed on the spot. "I didn't want them blaming other people," he said.

"It would have caused a lot more concern if we had been effecting a big change," he added. "Our decision just let it all stand."

But court officials would not release Givan's name when asked about the leak for a story that appeared Saturday in *The Star*.

Givan expressed embarrassment about the mistake and said it would prompt him to be "a lot more careful."

Chief Justice Randall T. Shepard said that based on the information he has received, he believed no further action was necessary now.

Michael A. Mullett, a lawyer for the Citizens Action Coalition, said he remained stunned about the leak.

His organization was one of three parties in the case that protested the rate increases.

Mullett was the first to question a possible connection between PSI's large trading volume and a leak. Those involved in the leak were uncovered Wednesday by the *Courier-Journal* in Louisville, Ky.

Mullett has filed general information on the events with the U.S. Securities and Exchange Commission.